

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

GOLDEN, et al.,	.
	.
Plaintiffs,	.
	. Case No. 15-cv-08559
vs.	.
	. Newark, New Jersey
NEW JERSEY INSTITUTE OF	. March 5, 2018
TECHNOLOGY, et al.,	.
	.
Defendants.	.

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE LEDA DUNN WETTRE  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Commencement of proceedings at 12:11 P.M.)

2

3 THE COURT: All right. Good afternoon, counsel.  
4 We're on the record in Golden and Locke versus NJIT,  
5 15-cv-8559.

6 May I have appearances, please.

7 MS. TOWNSEND: Katie Townsend on behalf of  
8 plaintiffs Daniel Golden and Tracy Locke.

9 THE COURT: Good afternoon.

10 MR. POTTERS: Good afternoon, Your Honor, Gary  
11 Potters, Potters & Della Pietra on behalf of defendants New  
12 Jersey Institute of Technology and Clara Williams, also  
13 third-party plaintiffs.

14 THE COURT: Good afternoon.

15 MR. AMORE: Good afternoon, Your Honor, Christopher  
16 Amore from the U.S. Attorney's Office on behalf of the  
17 third-party defendants, the Federal Bureau of Investigation.

18 THE COURT: Good afternoon. And you're from this  
19 office, then, in New York?

20 MR. AMORE: Yes, Your Honor.

21 THE COURT: Okay. Very good. So it's  
22 Ms. Townsend's clients' motion, and I'll hear you first,  
23 Ms. Townsend.

24 MS. TOWNSEND: Would you like me up here,  
25 Your Honor?

1 THE COURT: Oh, wherever you're comfortable. I  
2 know that's not -- there's not a lot of room to put your  
3 things, so you won't offend me if you go to the table. I  
4 wish I had a bigger lectern, but I don't.

5 MS. TOWNSEND: I think it's -- I think it's fine.

6 THE COURT: Okay.

7 MS. TOWNSEND: Hopefully, I won't drop anything.

8 THE COURT: Okay. If you do, you're forgiven.

9 MS. TOWNSEND: As plaintiffs laid out in our  
10 briefing, Your Honor, this is really essentially a two-step  
11 analysis for the Court. The first question is are the  
12 plaintiffs the prevailing parties? And if the answer to that  
13 is yes, the second step of the analysis is pretty  
14 straightforward, because if they are the prevailing parties,  
15 a fee award is mandatory under New Jersey's Open Public  
16 Records Act.

17 In this case, because there hasn't been a court  
18 order concerning disclosure -- in fact, there was what was  
19 effectively a settlement with respect to disclosure -- in  
20 order to determine whether or not plaintiffs are, in fact,  
21 prevailing parties, the Court should look to the New Jersey  
22 Supreme Court's decision or its analysis in Mason against  
23 Hoboken of -- the City of Hoboken. That case, which  
24 recognized the catalyst theory, what we call the catalyst  
25 theory, acknowledged that there really are really two factors

1 that the Court need to take into consideration. Plaintiffs  
2 are the prevailing parties if there's a factual causal nexus  
3 between the relief they obtained and the litigation; so it's  
4 effectively a causation requirement. The second factor is  
5 whether or not that relief had basis in law.

6 I think, as we pretty clearly laid out in our  
7 briefing, Your Honor, plaintiffs in this case satisfy both of  
8 those requirements. Prior to this litigation being filed,  
9 plaintiffs, Mr. Golden and Ms. Locke, made three Open Public  
10 Records Act requests to the New Jersey Institute of  
11 Technology. The first request -- in response to the first  
12 request, I should say, NJIT released 540 page of redacted,  
13 really heavily redacted documents and indicated that it was  
14 withholding in full, 4,000 pages of records. With respect to  
15 the second request and the third request --

16 THE COURT: Let me ask you something.

17 MS. TOWNSEND: Sure.

18 THE COURT: And when they responded to the first  
19 request with -- along with the production, they also asserted  
20 some exemptions. Correct?

21 MS. TOWNSEND: That is correct, Your Honor.

22 THE COURT: Okay.

23 MS. TOWNSEND: They asserted exemptions under the  
24 New Jersey Open Public Records Act, so they were all state  
25 law exemptions. Those were the same exemptions that were

1 | cited in denying both the second and third requests in their  
2 | entirety.

3 |           So in response to all three requests NJIT asserted  
4 | that there were exemptions that justified nondisclosure under  
5 | OPRA.

6 |           THE COURT: Okay. And the first time those  
7 | exemptions were asserted is when they made the first  
8 | production. Right?

9 |           MS. TOWNSEND: That is correct, Your Honor.

10 |           THE COURT: Okay. And at that time that they made  
11 | the production, did they also make clear that they were  
12 | withholding certain documents at the behest of the FBI?

13 |           MS. TOWNSEND: That's correct, Your Honor. It was  
14 | our understanding at the time that what had occurred was that  
15 | the FBI had, in fact, indicated that those documents were  
16 | subject to OPRA exemptions and that NJIT was effectively  
17 | saying these are the OPRA exemptions. We've received input  
18 | from the FBI regarding these exemptions, which, again, is not  
19 | a process that we've objected to. I don't think we've ever  
20 | objected to the idea that NJIT could consult with the FBI  
21 | concerning whether or not they believe documents may or may  
22 | not be exempt from disclosure under OPRA.

23 |           THE COURT: Okay. So -- so is it your  
24 | understanding that the exemptions NJIT has served in response  
25 | to OPRA Request 1 were those that the FBI in effect asked

1 | them to observe -- assert?

2 |           MS. TOWNSEND: I think so, Your Honor. I don't  
3 | know for sure. But I believe that's the case. I believe  
4 | that my understanding of what occurred is that NJIT informed  
5 | the FBI that it had received these OPRA requests and that  
6 | individuals from the FBI assisted or told NJIT in some way  
7 | what documents they -- NJIT should withhold in response to  
8 | the requests. I believe that is what occurred.

9 |           THE COURT: Okay.

10 |           MS. TOWNSEND: After this litigation was filed --  
11 | so it was clear, in other words, that my clients' requests  
12 | had been denied, and documents were being withheld, in their  
13 | view, unlawfully under OPRA. They initiated litigation. And  
14 | I want to be clear, because think this is the distinction  
15 | between not only what occurred, the sort of factual scenario  
16 | that occurred in Mason, but I think also what occurred in  
17 | Spectraserve, which is the Appellate Division case that NJIT  
18 | relies quite heavily on its briefing.

19 |           This is not a situation where the agency was going  
20 | to comply or in the process of releasing records in response  
21 | to the OPRA requests. This wasn't a situation where the same  
22 | records would have been released but for the fact that had  
23 | the -- I should say it this way. The same records would have  
24 | been released, even if no litigation had been filed. In  
25 | other words, my clients had been denied. Their options were

1 walk away and get nothing or initiate litigation to challenge  
2 the withholdings with respect to the first request and all of  
3 the holdings with respect to the second and third requests.  
4 So they chose that path.

5 Which is not only what they're entitled to do under  
6 OPRA, but I would say is also what the statute intends and  
7 incentivizes plaintiffs to do, to, if they've been wrongfully  
8 or unlawfully denied access to public records, to pursue that  
9 in litigation.

10 THE COURT: But let me ask you something, because I  
11 think that this is one of the critical questions. So, you  
12 know, under the factual causal nexus part of the catalyst  
13 theory, I need to look at whether the behavior of the  
14 custodian from whom you seek fees, changed as a result of the  
15 OPRA lawsuit.

16 So I'm looking very carefully at what NJIT's  
17 response was pre OPRA lawsuit and post OPRA lawsuit. And it  
18 seems as if there was a consistent position throughout, which  
19 is we've been prohibited by the FBI -- and I know that you  
20 disagree that they can be prohibited and that that is  
21 commensurate with their duty under OPRA. But the exemptions  
22 we're asserting are even based on what the FBI is telling us.  
23 And then post lawsuit, I'm very familiar with the process  
24 that was undergone where the documents that were produced  
25 were released by the FBI, that NJIT acted as a conduit to



1 send them from the FBI to Mr. Golden and you as they were  
2 reviewed and released by the FBI.

3 So what behavior of NJIT changed as a result of the  
4 filing of the OPRA lawsuit?

5 MS. TOWNSEND: And I would say, Your Honor, you're  
6 right to say that we sort of disagree with the premise that  
7 it's okay for NJIT to simply say, well, this is the FBI's  
8 responsibility, and we don't have to have anything to do with  
9 it. So we disagree with that premise. I think that is  
10 inconsistent with their statutory obligations under OPRA.

11 But even that aside, I think there was a change in  
12 conduct, because we made a request and directed to -- or  
13 plaintiffs made requests directed to NJIT. NJIT effectively,  
14 with respect to -- with the caveat that there were some  
15 records released in response to the first request, denied  
16 those requests. They asserted exemptions under OPRA, and  
17 they said you're not getting these records.

18 Once the litigation was filed, NJIT made it very  
19 clear to the Court, as we point out in our filings, that they  
20 were abandoning their reliance on those. They did not stand  
21 by -- I think, is the language -- with the exemptions that  
22 had been asserted. We agree --

23 THE COURT: How did they abandon them?

24 MS. TOWNSEND: They indicated that they would not  
25 defend them. And that they -- and I think at that point,

1 when you indicate that, that you don't defend them, I  
2 think -- I can give you the cite to the letter that was  
3 written, Your Honor, that we cite in our brief.

4 THE COURT: Please do.

5 MS. TOWNSEND: I believe it's the letter to Judge  
6 Mitterhoff dated October 8th, 2015. It -- I apologize, it  
7 might be the December 17th, 2015, letter that we cited in  
8 Footnote 1 to our brief, both on page 4. Both of those, it's  
9 ECF Number 1-3.

10 THE COURT: The December letter was to me. Right?

11 MS. TOWNSEND: Yes, I apologize that was --

12 THE COURT: So that's the letter you're relying on?

13 MS. TOWNSEND: I believe it's -- I'm not sure which  
14 one it is, but either of those -- I believe it's one of those  
15 two letters where NJIT makes clear that it had no intention  
16 or standing behind -- or it is the letter to you. I  
17 apologize. It's access Number 5-2.

18 THE COURT: ECF -- say that again.

19 MS. TOWNSEND: ECF Number 5 --

20 THE COURT: Number 5, at page 2 --

21 MS. TOWNSEND: -- December 17th, 2015, at 2.

22 THE COURT: Okay.

23 MS. TOWNSEND: According to NJIT, the FBI advised  
24 it that it was going to intervene in the state court  
25 proceeding, as a means to stand behind its redactions and

1 | directions, to withhold, in response to OPRA request, the  
2 | approximately 4,000 of documents, NJIT made it clear in that  
3 | correspondence, I believe it was that correspondence, it may  
4 | have been the letter to Judge Mitterhoff, that it was not  
5 | standing by those redactions. That it was relying on the FBI  
6 | to do so. It approached plaintiffs prior to suing the FBI to  
7 | bring it into the litigation, to ask for an extension of  
8 | time, so that the FBI could intervene. We said that's fine.  
9 | We allowed that.

10 |           The FBI did not intervene. The reason that the FBI  
11 | became a party to this litigation is because NJIT sued it,  
12 | not because of anything related to disclosures in this case.  
13 | Not because NJIT felt that it was rightfully or lawfully  
14 | withholding these records under OPRA.

15 |           I think the record is very clear that NJIT's  
16 | concern, primary concern, if not only concern, was attorney's  
17 | fees liability. The indemnification claim that it filed  
18 | against the FBI at the very outset of this case was directed  
19 | to a potential attorney's fees claim, because NJIT's position  
20 | was, I think, we know there are unlawful withholdings here,  
21 | but we were told to do it by the FBI, so therefore, it's  
22 | okay.

23 |           THE COURT: Well, I mean, I think you've got to  
24 | look at the context, and I lived through it to an extent as  
25 | well. And the -- I recall it became pretty clear, once you

1 all were before me, that we had an understanding about how to  
2 balance Mr. Golden's interest in getting the documents and  
3 the FBI's assertions of security interests, if you will, in  
4 the documents.

5           So I don't think -- I don't recall the NJIT ever  
6 stating before me that they -- if litigated, they would not  
7 stand behind the exemptions they had asserted. I think they  
8 sort of -- they were saying to the Court, the FBI has  
9 highjacked, if you will, this process. They're reviewing the  
10 documents. We're -- the documents are passing through us to  
11 you. So we're not going to be duking this out in a  
12 litigation context.

13           But if I'm wrong about that, correct me, because  
14 you all know the case much better than I do. I've got  
15 hundreds.

16           MS. TOWNSEND: I think it's -- I wouldn't  
17 necessarily say that the FBI highjacked the process. I would  
18 say that NJIT gave the process or attempted to hand the  
19 process over to the FBI. I mean, as we point out in our  
20 briefing, Mr. Golden made similar requests to other  
21 universities, who processed these OPRA -- not OPRA requests,  
22 but these public records requests that were very similar and,  
23 in fact, resulted in other universities giving us the exact  
24 same records that were being withheld by NJIT under their own  
25 public records laws.

1 THE COURT: Well, let me ask you something in that  
2 regard, and this, to me, is important too. The cases are --  
3 the few cases on the catalyst theory say it's a  
4 fact-sensitive inquiry, and one of the things the Court must  
5 look at is the reasonableness of the custodian's response.  
6 And, you know, what -- I was struggling, as I read the  
7 plaintiff's papers, to understand what response the  
8 plaintiffs would have deemed reasonable, other than NJIT  
9 completely ignoring the FBI's directives, which was cloaked  
10 in national security terms, almost. Not quite, but in "Do  
11 not do this, we have a right -- this is our information. Do  
12 not disclose it."

13 So what -- what would have been reasonable other  
14 than ignoring the FBI?

15 MS. TOWNSEND: Well, at first, if I could go to the  
16 legal point too on the reasonableness requirement, and I  
17 would -- I would say that it's not quite as presented. I  
18 think in Mason, the Supreme Court made clear that when  
19 evaluating the factual causal nexus prong of the catalyst  
20 theory, the courts look to all the circumstances around it.  
21 That is completely true.

22 And I think, again, in both Mason and --  
23 Spectraserve, you're dealing with situations where the agency  
24 was, in fact, releasing records. It just wasn't doing it as  
25 quickly as the plaintiffs in those cases wanted. It wasn't a

1 situation -- yeah, unlike here, where the plaintiffs had to  
2 litigate in order to get access to the records. We had no  
3 choice.

4 But I -- I would say that the only case that NJIT  
5 has cited for this idea that reasonableness is sort of an  
6 independent inquiry is the Path v. Borough of Garwood  
7 [phonetic] case, which is an unpublished appellate decision  
8 from -- or Appellate Division that relied solely on the  
9 common law right of access.

10 So I don't even think that we're in that world,  
11 because once you establish prevailing party under the  
12 catalyst theory, then OPRA mandates fees. So there isn't a  
13 sort of reasonableness exception.

14 But I will say this too --

15 THE COURT: Well -- well, I -- you know, I counted,  
16 because I did read carefully, and I take notes as I read  
17 cases, and the reasonableness is discussed in Spectraserve,  
18 Mason, Path v. Garwood, as you say, and Gannett. And there  
19 aren't that many catalyst cases. So I think pretty much  
20 every catalyst case discusses reasonableness.

21 MS. TOWNSEND: And Gannett is a unique case. I  
22 wouldn't necessarily put that in the same category as both  
23 Spectraserve, which, again, is factually unique as well, or  
24 Mason, because in Gannett really what I think NJIT is relying  
25 on is the dicta in the Gannett case where the court is

1 indicating that when you have a situation somewhat -- I  
2 suppose, like this, where you have a federal agency that  
3 might be -- have an interest in the records, they should be  
4 notified. They should be given an opportunity to weigh in.

5 That's exactly what happened here. So I'm not sure  
6 that Gannett really indicates -- really has a bearing here  
7 one way or the other, because I think that is what happened,  
8 and the FBI had an opportunity to weigh in. They certainly  
9 had notice from the very outset of the plaintiffs' requests  
10 and of the litigation, even before they were brought into it.

11 But I think the Court is right: There isn't a lot  
12 of case law. I mean, we really are talking, I think, about  
13 Mason at the Supreme Court level, and really about  
14 Spectraserve in terms of the OPRA requirements.

15 But I will say this, because I understand what  
16 Your Honor is getting to, even apart from the legal point,  
17 sort of what was NJIT supposed to do? And I think that there  
18 were things that it certainly could have done prior to this  
19 litigation that would have short-circuited it. And the first  
20 would have been to not deny the request and force  
21 plaintiff -- and tell plaintiffs to go away or litigate. I  
22 mean, those were our only options at the outset because the  
23 requests were denied.

24 Had NJIT wished to consult with the FBI, go through  
25 essentially the process it went through really post law- --

1 during the course of litigation, I think it could have done  
2 that. It doesn't mean that plaintiffs would not --

3 THE COURT: Had that process begun, though? And  
4 I'll look back at it in the record, but hadn't that process  
5 begun at the time you filed the state court OPRA action?

6 MS. TOWNSEND: So let's take the first request, for  
7 example. That happened -- that response happened --

8 THE COURT: Because I remember Judge Mitterhoff was  
9 quoted as saying, let's give the FBI some time to sort this  
10 out.

11 MS. TOWNSEND: To be clear with respect to the  
12 facts, that process actually had not begun, unless you sort  
13 of count -- maybe you are -- the kind of -- the review that  
14 was done, not by counsel for the FBI, but rather by, I  
15 believe, nonattorneys to the FBI with respect to the first  
16 request. Very much pre litigation.

17 After that and once the litigation was filed, the  
18 FBI was not a party to the case. They weren't really  
19 involved. There was a hearing before Judge Mitterhoff where  
20 counsel for the FBI sort of appeared for the first time. I  
21 don't want to -- I very -- I want to be very careful not to  
22 mischaracterize anything, but it was essentially the counsel  
23 for the FBI saying we'd like some additional time to sort of  
24 evaluate what we want to do so that none of this sort of  
25 process in terms of the FBI acting as a sort of consultant in



1 reviewing records and then NJIT releasing those records,  
2 that -- that really occurred before you, Your Honor. And it  
3 wasn't really until there was a change -- actually a change  
4 of counsel for the FBI. I think there was an original  
5 attorney working on it.

6           So that process was not in play. I mean, I think  
7 it's fair to point back to what happened with respect to the  
8 first request. You could consider that a consultation to the  
9 FBI. The FBI reviewed some records, told NJIT what they  
10 thought should be withheld.

11           I think the real problem or really what gets sort  
12 of the meat of this is that it was NJIT's responsibility from  
13 the very outset to review the records. It's fine that it  
14 consults with another agency, but it has to be willing to  
15 stand by the exemptions that it's asserting. These were its  
16 records. I don't think there's any dispute that these were  
17 its records. Just because it was communicating with a  
18 federal agency doesn't mean that those are not its  
19 communications.

20           We really worry about if NJIT's position with  
21 respect to attorney's fees here is adopted, what does that  
22 mean for the next case or the next OPRA requester who asks  
23 NJIT, a public university, for communications between it and  
24 the Department of Education? Is this opening up a sort of  
25 ambiguous situation where NJIT can say, we're going to deny

1 | your requests and go away. If you decide to sue and litigate  
2 | it, I'm going to sue the Department of Education to bring  
3 | them into the case, essentially, to create ambiguity --  
4 | ambiguity around the attorney's fees issue.

5 |           THE COURT: But this is -- isn't one way to confine  
6 | any ill effect or anti-OPRA effect of this is consistent with  
7 | case law to look at, you know, why the custodian is doing it,  
8 | and because there are -- you know, in the case of Gannett,  
9 | there were, I guess, grand jury secrecy considerations --  
10 | confidentiality. The case of Spectraserve, there was a  
11 | respect given even to a third party's commercial privacy  
12 | interests.

13 |           So in your hypothetical, to look at the -- it  
14 | depends. If the Department of Education, what interests  
15 | they're asserting and asking the custodian -- one of the  
16 | custodians to stand down, because I think it's difficult when  
17 | you make a request that calls for a correspondence from the  
18 | FBI and the CIA to say, oh, just ignore all that and go ahead  
19 | and be a big boy, as custodian, and make your call  
20 | independent of that context, of the interests of third  
21 | parties, which the case law has said can be significant.

22 |           MS. TOWNSEND: And, again, I don't think we were  
23 | asking or suggesting that NJIT should have ignored -- should  
24 | have just not reviewed the documents and just handed them  
25 | over. I think, again, we've stated NJIT, in fact, had an

1 obligation to review the documents, could assert whatever  
2 exemptions under OPRA it thought was appropriate. If it had  
3 questions about whether or not a specific document should be  
4 exempt for some reason and it thinks -- and the FBI is the  
5 only one that can answer that, of course, it can consult with  
6 the FBI.

7 But I think NJIT has to be satisfied that what the  
8 FBI is telling it is, in fact, compliant with OPRA. I mean,  
9 I think if you look at the some of records that were  
10 ultimately released that are copies of my client's articles,  
11 for example, that publicly available reports that are on  
12 websites, things that are said -- you know, this is  
13 unclassified, but please don't distribute it, things like --  
14 of that nature.

15 THE COURT: Were those subsequently released?

16 MS. TOWNSEND: Those were subsequently released.

17 THE COURT: Right.

18 MS. TOWNSEND: And I think had --

19 THE COURT: But sometimes when you have 5,000 pages  
20 of documents, when you get to it, you realize, maybe there's  
21 a banner on it that gives you pause, and then you have to  
22 look through it.

23 So I understand. That happens a lot in document  
24 production.

25 MS. TOWNSEND: Had NJIT reviewed these documents at

1 the outset when it -- it would have, I think, pretty clearly  
2 realized, these are not documents that can be withheld under  
3 OPRA. And that's why they were released -- and when it --  
4 finally when these documents were reviewed by somebody after  
5 the litigation, they were released. That's why they were  
6 released.

7 THE COURT: They were reviewed by the FBI.

8 But let me ask you something, and this doesn't  
9 relate to -- plaintiffs didn't act in any respect improperly.  
10 They acted fully in accordance with their rights under OPRA.  
11 Yet, when you're assessing fees and reasonableness and so  
12 forth, I can't deny that I thought about, was the plaintiffs'  
13 decision to go after one of two custodians tactical?  
14 Because, look, OPRA defines custodian as the party that has  
15 custody or control.

16 Now, NJIT says, well, we weren't really a custodian  
17 because the FBI asserted control. But they had custody. And  
18 so did the FBI. That information reside -- or the CIA -- it  
19 resided on two different servers. And I wonder -- and tell  
20 me if I'm wrong -- if the same exact requests were served on  
21 the FBI pursuant to FOIA, and the same result occurred and  
22 FBI eventually released all these documents, post filing of  
23 the lawsuit, could the plaintiffs have gotten fees from the  
24 FBI?

25 MS. TOWNSEND: Yes, Your Honor. If -- if the

1 plain- -- FOIA also has a fee recovery provision, as NJIT has  
2 pointed out in its briefing.

3 I think there are lots of reasons that requests for  
4 particularly reporters will look at a situation where you  
5 might have communications between a state and federal entity.  
6 It's not an uncommon thing actually for a journalist --

7 THE COURT: Sure.

8 MS. TOWNSEND: -- requests. And I would say maybe  
9 it is a tactical reason, but I think not the reason that  
10 you're thinking of, why reporters will often go to the state  
11 entity, and that is because the FBI, as you can probably  
12 imagine, gets a lot more FOIA requests than the New Jersey  
13 Institute of Technology does. And so typically they process  
14 faster.

15 And so I -- I don't know what exactly was in  
16 Mr. Golden's head, but I believe that's what was in  
17 Mr. Golden's head.

18 And I will say this, he also did make FOIA requests  
19 to the federal government for similar correspondence with  
20 different universities. With respect to public universities,  
21 he generally went to the state entity, I believe, because he  
22 assumed -- and in many cases this was, in fact, I think,  
23 borne out by the fact that he documents very quickly, it was  
24 a faster way to go.

25 Generally speaking, I don't think it's tactical in

1 the sense that this was designed to get attorney's fees.

2 It --

3 THE COURT: I don't think it occurred to me, it  
4 might be more tactical in the sense of which forum you want  
5 to adjudicate before, because if you're going in under OPRA,  
6 you have a state court that's very adept at these -- quite  
7 accuse- -- accustomed to these applications. They have a  
8 faster process than we do. They do it by order to show  
9 cause. You often get a decision on the return date.

10 MS. TOWNSEND: That's right, Your Honor. And this  
11 litigation has been going on for two and a half years. That  
12 is -- I will tell you -- not what we anticipated when this  
13 case began.

14 And I want to emphasize too, I think we pointed  
15 this out in the briefing, but I think it's important to  
16 emphasize, this case has been going on a long time. The fees  
17 are high. The majority of those fees stem directly from  
18 NJIT's position with respect to attorney's fees. In other  
19 words, in March 1st -- on March 1st, 2017, the parties really  
20 ended what were discussions concerning disclosures,  
21 particularly given the deadline for Mr. Golden's book, which  
22 is now already published but which was pending. He felt he  
23 had enough to go forward. He decided not to challenge  
24 with -- remaining withholdings after some back and forth  
25 between counsel- -- plaintiffs and counsel for the other

1 parties. Reached effectively what was a settlement.

2 Since March 1st of 2017 -- we pointed this out in  
3 our open brief -- the plaintiff's attorney has spent more  
4 than a hundred hours addressing what was effectively whether  
5 or not we were entitled to fees.

6 THE COURT: That's a lot.

7 MS. TOWNSEND: That's a lot. And it's -- it's not  
8 what we were anticipating. It's not what we would have  
9 wanted. I think it's --

10 THE COURT: And is that -- and that is fully  
11 recoverable, fees to get fees?

12 MS. TOWNSEND: Fees on fees are fully recoverable,  
13 Your Honor. And I think -- I -- I think that being said, I  
14 also think it's important. I think the fees issue in this  
15 case is important, because the New Jersey legislature, when  
16 it enacted a mandatory fee provision -- which I will tell you  
17 is not as common. There are states that have discretionary  
18 fee shifting in public records cases. That's a choice.  
19 That's a legislative choice, and it's designed to remove  
20 uncertainty.

21 And the kind of uncertainty that we're facing right  
22 now, you know, I think it's -- it's a good thing that  
23 Mr. Golden and Ms. Locke had counsel willing to take on this  
24 case pro bono and willing to pursue the fees issue, because I  
25 believe that it's an -- quite important. I think, given

1 | journalists -- given Mr. Golden or journalists like him,  
2 | given their views in terms of, you know, getting what they  
3 | wanted out of the litigation, I'm not so sure that if he were  
4 | paying full freight, that he would want to double the costs  
5 | of this litigation, arguing about fees. And that's where we  
6 | are right now.

7 |           So I think I would leave with that. I think, you  
8 | know, we outlined the sort of policy considerations in our  
9 | brief, but we think it's quite important to emphasize that  
10 | really what mandatory fee shifting does is provide certainty  
11 | to plaintiffs that if they pursue litigation where they  
12 | believe they will be successful on the law that even if they  
13 | reach a settlement, which is what the catalyst theory sort of  
14 | provides for -- and I think, frankly, should be encouraged.  
15 | I mean, I don't think we want to be in a position where we  
16 | reach agreement with all the parties, can you re- -- do what  
17 | we did in this case. Could you look at some of these  
18 | withholdings and reevaluate them? We think we would be  
19 | willing to not challenge these other withholdings.

20 |           When the parties do that, I think that's  
21 | beneficial. I think that's something that should be  
22 | encouraged. I don't think it should be held against  
23 | plaintiffs in an attorney's fees dispute, that we decided to  
24 | resolve our disclosure issues without seeking a judgment,  
25 | because if we had a --



1 THE COURT: Right.

2 MS. TOWNSEND: -- court, a judgment, a ruling  
3 requiring these documents to be released as opposed to just  
4 reaching an agreement among the parties, this wouldn't even  
5 be an issue, because we'd be the prevailing parties clearly.  
6 The Court wouldn't even need to get into the catalyst theory.  
7 And OPRA would mandate fees.

8 THE COURT: I understand. Let me ask a couple of  
9 miscellaneous questions. One is in the reply brief, you  
10 brought out essentially an objection to the use of stipulated  
11 facts. I read all the facts that were actually submitted  
12 under declaration first. And I don't think the stipulated  
13 facts really were anything that weren't already of record.  
14 It maybe just put the FBI on record saying they agreed with  
15 the facts as presented by NJIT.

16 So, you know, why don't you state what your  
17 position is on the stipulated facts. Do you disagree? Is  
18 there a particular stipulated fact that you object to the  
19 Court considering, because it's not submitted under  
20 declaration somewhere else?

21 MS. TOWNSEND: I think, Your Honor, we would -- I  
22 think there -- the stipulated facts certainly characterize  
23 some facts, I think, in ways that are different from the  
24 joint status reports that the parties submitted. I mean, I  
25 think it's very clear from joint status reports that were

1 submitted, the parties all understood -- or at least the  
2 plaintiffs understood or thought that all the parties  
3 understood that this was a consult from the FBI, that was  
4 reflected in the correspondence that NJIT then later provided  
5 to the plaintiffs in conjunction with the productions. I  
6 think that there's sort of an attempt to kind of  
7 recharacterize some of the facts. I think, to be frank with  
8 you, some of the facts that are listed in the stipulated  
9 facts are actually helpful for us.

10 I think if you look at the language under  
11 paragraphs 3, 4, and 5 that provide examples of the  
12 dissemination controls that NJIT was relying upon, it makes  
13 it kind of -- and particularly when you compare it to some of  
14 what we point out in our reply, records that were released  
15 that had these dissemination controls on them that were, in  
16 fact, public records, it sort of undercuts NJIT's position  
17 that they were very concerned about the national security  
18 implications of some of these records and were -- I think  
19 there's a lot of heightened language in NJIT's briefing that  
20 suggests that we're talking about classified matters. And,  
21 of course, it's not at all what we're talking about. No one  
22 at NJIT, at least -- there's been no assertion, has the  
23 necessary security clearances to view that kind of material.

24 So I -- I would say that I think our concern is  
25 that to the extent NJIT and the FBI are agreeing to how some

1 things should be characterized and stipulating to those  
2 facts, that's fine vis-à-vis NJIT and the FBI. And they have  
3 an ongoing pending dispute over the event that there is an  
4 attorney's fee award to plaintiffs, who should pay that. And  
5 I think that's certainly can be utilized by those two  
6 parties, because they've stipulated to it.

7 I think our concern was by portraying this as a  
8 stipulated fact, suggests that plaintiffs have also  
9 stipulated to this when that, in fact, is not the case. I  
10 think that the correspondence and what has been averred to in  
11 an evidentiary format is what this Court should look to.

12 THE COURT: Okay. One final thing and this is  
13 more, perhaps, the Court's duty to figure out than yours, but  
14 I just wondered if you've come across it. This motion went  
15 on my motion list. I know that when we discussed it a while  
16 ago in the context of whether there would be discovery on the  
17 attorney's fees portion, I had had a conversation with Judge  
18 Arleo, and she had suggested and I think I passed it on to  
19 you-all, that you consent to magistrate judge jurisdiction  
20 because it just concerned fees.

21 You know, some cases treat this kind of motion as  
22 dispositive, and others don't.

23 Do you have -- do you care? Do you have an opinion  
24 on it? Should I issue a report and recommendation? Or  
25 should it be my opinion, and then if you have a problem with

1 it, you appeal to the Third Circuit and not Judge Arleo.

2 MS. TOWNSEND: I think our expectation, actually,  
3 was that it would be a report and recommendation to Judge  
4 Arleo.

5 THE COURT: Okay.

6 MS. TOWNSEND: That's what we were anticipating.

7 THE COURT: Right.

8 MS. TOWNSEND: That being said, I think, again,  
9 this is been long-running enough, that I don't think the  
10 delay in terms of an appeal would make all that much of a  
11 difference to us, as plaintiffs.

12 THE COURT: Okay.

13 MS. TOWNSEND: And I also --

14 THE COURT: But you were assuming an R & R.

15 MS. TOWNSEND: I was assuming that, Your Honor.

16 THE COURT: Okay. Got you. That's good enough.  
17 Thank you very much.

18 MS. TOWNSEND: Thank you.

19 THE COURT: Mr. Potters.

20 MR. POTTERS: Do you mind if I stand here, Judge?

21 THE COURT: Not at all.

22 MR. POTTERS: Because I have got a lot of paper.

23 THE COURT: I see that.

24 MR. POTTERS: I don't think I'm going to need much  
25 of it.

1           Let me work backwards, though, before I get to my  
2 arguments, if I may. In terms of the stipulated facts, the  
3 stipulated facts are necessary, because plaintiff, in the  
4 argument that we heard here today and also in the briefs on  
5 this motion, refuses to accept what occurred with regard to  
6 the role of the FBI in this action. Plaintiff continues to  
7 state "NJIT contends." "NJIT submits."

8           The reason why we did the stipulated facts is to  
9 put any of those issues to bed. And we heard it earlier  
10 during the argument of counsel in response to a question on  
11 the issue of duty where plaintiffs' counsel said that the  
12 NJIT -- NJIT needs to be satisfied that what the FBI was  
13 doing comports with OPRA, and plaintiffs' counsel said, the  
14 documents were reviewed by somebody.

15           That's the best evidence of why we prepared the  
16 stipulated facts, to make clear NJIT did not review the  
17 documents. That's one point.

18           Another point --

19           THE COURT: It collected the documents.

20           MR. POTTERS: NJIT assembled the documents, and  
21 then based on the monikers, reached out to the FBI and said  
22 these are pretty much your documents. What do you want us to  
23 do with them?

24           THE COURT: Should NJIT have reviewed the documents  
25 and made an independent call?

1 MR. POTTERS: Absolutely not.

2 THE COURT: Why not?

3 MR. POTTERS: The best evidence of that, Judge, is  
4 based on the facts of what occurred here. After the  
5 documents were assembled, the FBI conducted its review over  
6 a -- period, provided direction to NJIT with regard to the  
7 exemptions. The letter was then produced May 27th, 2015, to  
8 the plaintiff directing the plaintiff to issue a FOIA  
9 request. And the litigation was filed.

10 We had to reassemble the documents. Okay? Because  
11 the documents were -- were entrusted to the FBI, and we  
12 needed to create a new set because there was a new team at  
13 the FBI through the Department of Justice that was going to  
14 review the documents.

15 So Your Honor's question is shouldn't have NJIT  
16 have reviewed the documents? We assemble- -- we reassembled  
17 those documents, which was no small feat and no small amount  
18 of fees to my client, and the records reflect that general  
19 counsel at NJIT, Holly Stern [phonetic], is here.

20 What happened then is we made those doc- --  
21 reassembled documents available to an FBI representative,  
22 John Genoble [phonetic], in our conference room. And we  
23 said, Can we copy these?

24 Answer: No.

25 Could we send these out to be re-produced by a copy

1 service? We'll get it back in two hours.

2 Answer: No.

3 Can we Bates-stamped documents, because at some  
4 point, we anticipated that, based on the litigation, there  
5 would need to be the OPRA index, and you'd need to refer to a  
6 document by Bates stamp.

7 Answer: No.

8 So whether or not NJIT even had a desire to review  
9 the documents substantively, its hands were tied.

10 THE COURT: But was that the FBI's right to tell  
11 you, as records custodian, that you couldn't -- you couldn't  
12 review the documents, you couldn't make calls under OPRA, and  
13 then putting you in what you've characterized as the Hobson's  
14 choice of being subject to their review and maybe having to  
15 pay fees?

16 MR. POTTERS: It certainly presents an issue. But  
17 I think this is the exact issue that the Gannett decision  
18 anticipated. And there's one thing that I do agree with  
19 plaintiff completely is there is no law on this. This is a  
20 unique issue.

21 But as Gannett makes clear -- and I'm quoting 379  
22 N.J. Super. 205 at page 214, quote, "The party with the  
23 interest in maintaining the confidentiality of investigatory  
24 materials and the capacity to explain the need for that  
25 confidentiality is the investigatory agency, here, the United

1 States Attorney's Office, rather than the party in possession  
2 of the materials." Quote closed.

3 THE COURT: Right. And then -- you know, it --  
4 that calls to mind -- I'm sorry to interrupt you. But it  
5 calls to mind, I think it was in Spectraserve that in a  
6 similar situation -- and forget whether it was a party who  
7 requested it or the court that *sua sponte* ordered it, said to  
8 the third party, you're required to intervene to assert your  
9 third-party interest or forever hold your peace and deem it  
10 waived.

11 I mean, that didn't happen here. Could it have?

12 MR. POTTERS: And let's talk about that, because  
13 counsel had referenced that. And that is replete throughout  
14 the JSRs, the joint status reports. The argument previously  
15 interposed by plaintiffs was, hey, the FBI had an opportunity  
16 to intervene, it chose not to. Therefore, the FBI takes no  
17 position.

18 Now, how unsquare is that with the pleading filed  
19 by the FBI that seeks both declaratory and injunctive relief  
20 against NJIT is lost on me.

21 So there was no abandonment. And, in fact, a new  
22 team was put on the field, new U.S. attorney, and a gentleman  
23 from the Department of Justice in Washington.

24 THE COURT: So -- but to be fair, the FBI didn't  
25 intervene, even though it wasn't anticipated they would in



1 the state court, but when NJIT then impleaded the FBI, they  
2 asserted --

3 MR. POTTERS: Correct.

4 THE COURT: -- they sought to enjoin NJIT from  
5 producing the records.

6 MR. POTTERS: Yes. And to supplement that, so the  
7 record's clear, John Genoble, the Newark office of the FBI,  
8 is the one who asked me to secure the extension from  
9 plaintiffs' counsel. Please get an extension of time. We're  
10 going to intervene. Essentially, relax.

11 And I didn't speak to Ms. Townsend. I spoke to her  
12 local counsel, Ms. -- Bruce Rosen and communicated that to  
13 him. That statement by plaintiffs' counsel's a hundred  
14 percent correct. That's exactly what happened.

15 I don't know why they didn't intervene. I was  
16 told -- it was suggested to me that there's a process by  
17 which intervention occurs. As Your Honor is well aware from  
18 the joint status reports, some of the issues between the FBI  
19 and NJIT are intellectually esoteric, to it mildly.

20 But -- but I say that somewhat humorously, but I go  
21 back to a point that counsel made: Fees on fees. So much of  
22 the time that was spent by plaintiffs' counsel was to prevent  
23 NJIT from doing what it suggested at one point it may do,  
24 which was to dismiss the claim against the FBI, go back to  
25 state court and have Judge Mitterhoff adjudicate the case.

1 There's -- there's at least two or three JSRs on that, and  
2 there's extensive submissions to Your Honor on that, in  
3 particular, as to how the Court retains jurisdiction. Those  
4 are pretty heady issues that, honestly, I haven't dealt with  
5 since law school.

6 So it's not fees on fees. It's fees designed to  
7 keep this in a forum that they believed was somehow more  
8 desirable than returning back to Judge Mitterhoff.

9 Another point --

10 THE COURT: I guess I should take that as a  
11 compliment.

12 MR. POTTERS: I find it interesting that Mr. Golden  
13 made FOIA requests to other public entities. And I'll just  
14 leave that alone for now.

15 The -- the statement by plaintiffs' counsel that  
16 after the third OPRA request was responded to by NJIT, that  
17 plaintiff had no choice but to walk away or litigate, is not  
18 complete. Plaintiff had an opportunity to issue a FOIA  
19 request. And he did not.

20 THE COURT: But he's not required to, either.  
21 Right?

22 MR. POTTERS: He's not required to.

23 But let's talk about that. Under the state court  
24 practice, when the verified complaint and the order to show  
25 cause are filed, then we appeared before Judge Mitterhoff on

1 the return date, that was the exact question that Judge  
2 Mitterhoff put to plaintiffs' counsel. And in the order that  
3 was entered by Judge Mitterhoff -- and that order was the  
4 subject of, shall we say, voluminous exchanges between  
5 counsel. In the first paragraph, quote, under paragraph B,  
6 quote: The Court's -- recognition of defendant NJIT's  
7 compliance with the written direction of the FBI to not  
8 produce certain documents.

9 I went to stand up, and one of those proverbial,  
10 Sit down.

11 And then the question was put to plaintiffs'  
12 counsel -- here's the May 27, 2015, letter -- Why didn't you  
13 issue a FOIA request?

14 To answer Your Honor's question, there has been  
15 absolutely zero change in NJIT's position throughout. Zero  
16 change.

17 THE COURT: Walk me through it with respect to the  
18 exemptions, because the -- we have to put a fine point on it  
19 there. Did NJIT -- well, first of all, did NJIT withhold  
20 any -- withhold any documents on the basis of exemptions it  
21 was asserting on its own behalf?

22 MR. POTTERS: The answer is no. NJIT did not  
23 withhold any documents on its on behalf. NJIT did not redact  
24 any documents on its own behalf. NJIT made zero redactions.  
25 NJIT had zero substantive involvement in what documents to

1 withhold and ultimately the decision to withhold documents.

2           At -- and that's why the stipulation is so  
3 critically important and the actual facts do matter. When  
4 those documents were assembled and the FBI folks came to the  
5 NJIT conference room, the door was shut, and it was  
6 essentially, "We got it from here." NJIT did not participate  
7 in the review; did not participate in substantive,  
8 deliberative analysis of the documents; did not make any  
9 redactions; did not make any decisions with regard to  
10 withholding documents.

11           Rather, the FBI -- rather, the FBI did all of that.  
12 And NJIT relied on the lawful direction provided to it by the  
13 FBI.

14           THE COURT: Why was it the lawful direction? I  
15 mean, it seems obvious, because we live in a world where the  
16 FBI tells you to do something, you do it. But -- but what  
17 was the actual authority pursuant to which they could direct  
18 you not to respond independently to the OPRA request?

19           MR. POTTERS: In preparing for the oral argument, I  
20 actually went back and was rereading all of our responses,  
21 NJIT's responses. And I refer to one of the responses on  
22 April 8th, 2015, and in answer to Your Honor's question, what  
23 authority, what NJIT did is it quoted from the monikers that  
24 were on the documents. So under exemptions -- and I'm  
25 quoting -- please be advised that emails, paren, 3,696 pages,

1 close paren, from the FBI that have one of the following  
2 statements written on them, quote, this document, comma, or  
3 any segment, thereof, comma, may not be rewritten, comma,  
4 posted on the Internet, comma, or given to any other public  
5 or private entity without prior written or verbal approval  
6 from the Federal Bureau of Investigation. Period. Quote  
7 closed. Or, period, quote, publication of reproduction  
8 prohibited, slash, initial cap unclassified, period. Quote,  
9 closed. Or, comma, quote, this document is, initial cap,  
10 unclassified, slash, initial caps, for official use only,  
11 period. Quote closed. Or, comma -- or, quote, rather, this  
12 document is for, initial caps, official use only and is not  
13 to be posted on external website and limited internal  
14 distribution to those who have a need to know. Period,  
15 closed quote.

16 THE COURT: So that -- that was the authority that  
17 you understood they were acting under, even if they were  
18 helping themselves to, you know, a protective order or  
19 confidentiality order that was unilaterally imposed, you  
20 still understood it to be -- have the force of law.

21 MR. POTTERS: World's premier law enforcement  
22 agency, NJIT is in communication with the FBI, sometimes on a  
23 daily basis. There were a number of foreign students. We  
24 live in a post-9/11 world. There are all kinds of issues  
25 with regard to security, with regard to work with the defense

1 department, which is exactly what Mr. Golden's book was  
2 about.

3 Support the book, by the way, haven't read it, but  
4 great idea, great concept, what's relationship between  
5 universities and our government. No issue with that. And  
6 I'm glad that somebody's shedding light on it.

7 But what is -- what is NJIT supposed to do?

8 THE COURT: Well, I think the answer may be defy  
9 the FBI.

10 MR. POTTERS: And certainly that's what plaintiff  
11 suggests, and --

12 THE COURT: And that's -- yeah. And that's a  
13 difficult -- you know, I'm concerned -- and this is more for  
14 Ms. Townsend -- I'm concerned about reporters' rights of  
15 access.

16 But I'm also concerned about setting a precedent  
17 that says, oh, you get an OPRA request, and the FBI or CIA  
18 tells you, don't you dare, and the -- and what you have to do  
19 is defy them in order to not be assessed fees. That's  
20 difficult.

21 Go ahead. Yeah, why don't you --

22 MS. TOWNSEND: Can I address that, Your Honor?  
23 Because I think -- the problem with Mr. Potter's position is  
24 that the authority that he's citing, which are these sort of  
25 stands on "documents for official use. Don't -- don't

1 disseminate it." That's not authority. It's a different  
2 scenario, if you're talking about the situation in Gannett,  
3 which involved, I believe --

4 THE COURT: That's not authority. That comes from  
5 the FBI. It's not like the town municipal pool says, do not  
6 reproduce this. It's --

7 MS. TOWNSEND: No, I think it's -- it's not -- it's  
8 not an OPRA exemption. So it's a different scenario --

9 THE COURT: Well, it could be an OPRA exemption.  
10 Right?

11 MS. TOWNSEND: It could possible- -- the document  
12 that is stamped that, could potentially be subject to an OPRA  
13 exemption.

14 THE COURT: It's a flag that it might be subject to  
15 a national security interest, which is an OPRA exemption.

16 MS. TOWNSEND: And maybe that's -- that's true.  
17 But I think it's --

18 THE COURT: Well, if it's terrorism-related.

19 MS. TOWNSEND: But I think it's not okay for NJIT  
20 to say, well, it's stamped "do not disseminate," so it's  
21 exempt from disclosure under OPRA. That's essentially what  
22 NJIT's position is.

23 In Gannett, when we're talking about --

24 THE COURT: But that isn't what they did. They  
25 said, so we have to let FBI take a look at them. Right?

1 MS. TOWNSEND: And, again, I think consulting with  
2 the FBI concerning whether or not these specific documents  
3 that maybe were stamped, "Don't disseminate these, not for  
4 public dissemination, don't post these on the Internet, don't  
5 distribute them to the media," NJIT seized that. They  
6 asked -- they would, I think, ask the FBI, is this exempt  
7 under -- from disclosure under OPRA?

8 I think that's the question that needs to be asked.  
9 And I think that's the question that was never asked. I  
10 think, in fact, that's what NJIT is saying. We took no role  
11 whatsoever in any of this. And unfortunately, for  
12 Mr. Potter's -- that's actually not allowed under New Jersey  
13 law. They're custodian of the records. They're responsible  
14 for -- for addressing this.

15 And I think some of the cases that we cite to in  
16 our -- in our briefing, Courier News, for example, which is  
17 not even addressed or distinguished in NJIT's brief, and also  
18 albeit an unpublished decision, I think it's helpful. Path,  
19 another Path case, the other one --

20 THE COURT: He was quite litigious.

21 MS. TOWNSEND: He was. He's a frequent requester,  
22 I guess we would say. West -- township --

23 THE COURT: Like Ms. Mason.

24 MS. TOWNSEND: Or also like Ms. Mason.

25 West -- Township is a case in which there was an



1 actual order -- I mean at least in that case, there was a  
2 protective order. Granted, it was a stipulated discovery  
3 protective order. And the court even found that wasn't  
4 sufficient.

5 And, here, we don't even have that. Basically what  
6 we have is an informal --

7 THE COURT: Okay.

8 MS. TOWNSEND: -- admonition from the FBI.

9 THE COURT: All right. I don't want to  
10 interrupt -- I'll give you another chance, but --

11 MS. TOWNSEND: I understand. I understand.

12 THE COURT: But, thank you.

13 Mr. Potter, please continue.

14 MR. POTTERS: I'm going to get to that custodian  
15 issue in a moment, but let's just not forget that, because I  
16 think that's a critical point.

17 Just so we're clear, if this was a moniker from the  
18 office of the governor, there is already provision under New  
19 Jersey state law that what NJIT was proper. There's an  
20 executive order -- that was --

21 THE COURT: Well, that's a specific exemption.  
22 Righted.

23 MR. POTTERS: Exactly. That was issued by  
24 then-Governor McGreevey in 2002, Executive Order Number 21.

25 And here, that doesn't exist for the FBI. And I

1 think Your Honor is striking the nail in the center of the  
2 head when Your Honor distinguishes this -- for whatever  
3 reason, I keep saying the Sussex County municipal utilities  
4 authority, but you can say the town pool.

5 THE COURT: Middlesex.

6 MR. POTTERS: There is -- there's a difference  
7 between that and the Federal Bureau of Investigation.

8 Let's -- let's step back, though, for a minute.  
9 Why are fees awarded under OPRA?

10 Fees are awarded under OPRA because it serves as a  
11 strong deterrent against withholding documents or asserting  
12 exemptions nakedly and for nonmeritorious reasons. That's  
13 why the statute, prescriptive as it is, is worded the way it  
14 is. And it is a strong statute.

15 And like the sunshine law which preceded it, it  
16 favors disclosure. Favors --

17 THE COURT: Government records counsel's  
18 instructions say that.

19 MR. POTTERS: Absolutely.

20 THE COURT: Exclamation point. Err on the side of  
21 disclosure.

22 MR. POTTERS: Exactly. And it all derives from the  
23 sunshine law.

24 And the overriding purpose in both the sunshine law  
25 and OPRA is so that the functioning of government is

1 transparent so that all of the backroom dealing, wheeling,  
2 dealing is now out in the open.

3 And I submit that's a salutary purpose of  
4 legislation.

5 And I'd also submit that the fee provision to work  
6 a strong deterrent, makes sense with that salutary purpose.

7 But upfront, what's the question? In evaluating  
8 the conduct of NJIT here, based on the actual facts, did NJIT  
9 act in any manner whatsoever without transparency? Did NJ  
10 act at any time without nonmeritorious reasons?

11 NJIT made a full disclosure and complete disclosure  
12 of the constraints that were imposed upon it, based on (A)  
13 the confidential moniker that appears on the documents; (B)  
14 the letter from the FBI that was provided, and I understand  
15 there was a second letter that was sent to the deputy general  
16 counsel of NJIT, similar effect, that's the May 27th, 2015,  
17 letter; and (C) the Department of Justice claims on behalf of  
18 the FBI for injunctive and declaratory relief prevents NJIT  
19 from making the very unilateral decision that plaintiff seeks  
20 to impose upon NJIT.

21 There's no choice. Once the FBI was involved and  
22 it shut the door and said, "We have it from here," we're  
23 done. There is no duty. There is no obligation. There is  
24 nothing else that we can do under these facts. Again, if it  
25 was the Middlesex County pool authority, that's different.

1 But when it's the FBI and we live in a post-9/11 --

2 THE COURT: I said in the Middlesex County because  
3 I thought you were talking about Spectraserve.

4 MR. POTTERS: There you go. Thank you.

5 Now, in terms of the actual facts here, it's  
6 undisputed that plaintiffs know before the lawsuit was filed  
7 and before they incurred dollar one in attorney's fees, that  
8 NJIT has no choice once the FBI asserted control over the  
9 documents. And if you go back, as I did, and reread all of  
10 the joint status reports from Joint Status Report Number 1,  
11 that's where, respectfully, we have this language NJIT  
12 contends, NJIT suggests, as if somehow I'm writing something  
13 as if it's an argument as opposed to a statement of fact.  
14 That's why we got the statement of facts.

15 It also --

16 THE COURT: Well, I think -- I think maybe the  
17 difference between your positions is not that -- and I'll ask  
18 Ms. Townsend on rebuttal to comment on this -- is not so much  
19 that plaintiffs are saying that the FBI didn't tell you that,  
20 but that you -- you had more of a free choice than you  
21 perceived and, indeed, were required to act under the law. I  
22 think that's the difference.

23 MR. POTTERS: I'm going to come back to that.

24 THE COURT: Okay.

25 MR. POTTERS: I'm going to come back to custodian,

1 and I'm going to come back to choice. I promise.

2 It bears repeating -- and it's of critical  
3 importance that most of these documents were actually FBI  
4 documents. And that bears on the custodian issue. Most of  
5 the documents had monikers on them advising the recipient  
6 NJIT and then directing the recipient. It was not presented  
7 as a normative proposition: You ought to consider not  
8 releasing this.

9 It was stated: Thou shall not produce these  
10 documents.

11 So there was no discretion on the part of NJIT.

12 And I think that's really the essence of this  
13 dispute where on page 2 of plaintiffs' reply brief, plaintiff  
14 states NJIT relied on, quote, direction, quote closed, of  
15 FBI.

16 And, again, the word "direction" is put in quotes  
17 as if somehow NJIT had some discretion.

18 You can't ignore the direction of the FBI saying  
19 these are FBI documents. If you want them, file a FOIA  
20 request. Ignore that. Then file an OPRA lawsuit. Then have  
21 the entity against whom the suit is filed say, see the FBI  
22 letter, file a FOIA request, and then be heard to complain  
23 about fees incurred under OPRA.

24 And that's really what this case is all about. And  
25 let's look at it in the context of the OPRA fee calculus,

1 which is presented by plaintiff -- and I have no dispute with  
2 this. You have a request for records. You have a denial of  
3 those records. You have a lawsuit that's then filed. After  
4 the lawsuit's filed, records are produced. And then you get  
5 fees.

6 I don't dispute that that is what so much of the  
7 case law says.

8 But let's talk about these facts under that OPRA  
9 calculus. And let's first talk about the request and the  
10 denial. Who made the denial? NJIT didn't make the denial.  
11 The FBI made the redactions. The FBI withheld documents from  
12 production, and plaintiff knew that before the lawsuit was  
13 filed. It was not NJIT.

14 Before the lawsuit was filed, the plaintiff knew  
15 that NJIT did not control the documents; that NJIT did not  
16 control the documents because the FBI had asserted control  
17 over them by providing NJIT with direction over what was to  
18 be produced; and plaintiffs knew all this based on the  
19 May 27th, 2015, correspondence. So this lawsuit was  
20 completely unnecessary in terms of obtaining release of these  
21 records.

22 THE COURT: They didn't file it, and if it weren't  
23 removed here, I wouldn't have badgered the FBI to keep  
24 releasing records and reviewing them more quickly, frankly.

25 MR. POTTERS: And --

1 THE COURT: Because that was a bit of a process.  
2 They wanted to go slowly.

3 MR. POTTERS: And that's correct, it was 500 pages  
4 over X amount of months, and then there were, I think, a  
5 total of eight productions.

6 But that goes back to the comment I made before  
7 about the return date on the order to show cause. Before we  
8 even came before Your Honor, question was put directly: Why  
9 didn't you file a FOIA request? And similarly, why don't you  
10 file a FOIA request?

11 We don't understand why the plaintiff never issued  
12 that FOIA request. And maybe it was a strategic move at the  
13 time. I am not suggesting for one moment that this lawsuit  
14 was filed so that it could trigger on award of fees. That's  
15 not my point when I say strategic purpose.

16 It could be substantively that the fee provision  
17 under FOIA is different than the fee provision under OPRA.  
18 And it's a higher standard under FOIA to get fees than it is  
19 here under OPRA.

20 Now, I won't go through the FOIA criteria. If  
21 Your Honor wants me to, I can.

22 THE COURT: No. That's okay.

23 MR. POTTERS: But it is a different standard.

24 THE COURT: They weren't required to do it. They  
25 didn't do it. That's un -- both of those are undisputed.

1 MR. POTTERS: But -- but last point on that is if  
2 there is a rejection of the stipulated facts, my position's:  
3 No problem. Let me take the plaintiff's position and ask  
4 him, why didn't you file a FOIA request?

5 But I don't think we're going there.

6 Let's talk about the next stage: the denial of  
7 records and then the filing of the lawsuit. Who do the  
8 plaintiffs sue? Or put better, who did the plaintiff not  
9 sue? Though plaintiffs possessed of knowledge who -- as to  
10 who was essentially the, quote, *de facto* custodian of the  
11 records. Just because you're in possession of the records,  
12 doesn't mean you're the custodian. The monikers on the  
13 documents, number one, with the letters written by the FBI to  
14 NJIT, the May 27th, 2015, letter, which was provided to  
15 Mr. Golden, and the second request -- was provided to  
16 counsel, once they got in the case, made clear that NJIT did  
17 not control the documents.

18 THE COURT: But they couldn't file -- they couldn't  
19 sue the FBI under OPRA. Right?

20 MR. POTTERS: No. But they could have issued a  
21 FOIA request then.

22 THE COURT: Right. So -- but that would have --  
23 the serving of the FOIA request would have been -- had to be  
24 a condition precedent to suing the FBI.

25 MR. POTTERS: Exactly. Exactly. And that was



1 already --

2 THE COURT: And then they would have had to sue the  
3 FBI in federal court. Right?

4 MR. POTTERS: That would have been over two years  
5 ago, yes.

6 And it -- I would respectfully submit, not that I  
7 have a crystal ball, I think it would have gone a lot faster,  
8 but that's just speculation on my part.

9 THE COURT: Well, you know, it did take a while  
10 here, but I'm not going to apologize for the Court, because  
11 what the Court did, frankly, avoided a lot of litigation and  
12 motion practice. No. I'm saying to both parties on behalf  
13 of the Court, that there's a lot of J -- you know, this -- we  
14 never envisioned it would take two and a half years, but nor  
15 did the parties have to acquiesce to the process suggested by  
16 the Court that turned over thousands of documents to  
17 Mr. Golden.

18 So -- and it took time for the FBI to review.

19 So anyway, to the extent delays are -- are  
20 referenced, I have to stand up for the Court. I'm not  
21 apologizing to any party for the length of time it's taken,  
22 because everyone was completely compliant in what was  
23 suggested.

24 MR. POTTERS: Judge, perhaps I misspoke. I wasn't  
25 suggesting --

1 THE COURT: No. I wasn't even directing it to you.  
2 Just the specter that's been raised during these arguments.

3 MR. POTTERS: No, and I want to be clear on that  
4 point, because it's -- it's an important point. I'm not  
5 suggesting that the Court delayed it. I'm suggesting that  
6 the time period from the appearance before Judge Mitterhoff  
7 until ultimately there was a resolution by way of the FBI or  
8 the Department of Justice rereviewing the documents and  
9 releasing them, would have been compacted --

10 THE COURT: Yes.

11 MR. POTTERS: -- if we were not here.

12 THE COURT: Yes, and I wasn't -- I wasn't inferring  
13 that you were saying that.

14 But, obviously, if an adjudication was required, it  
15 would have happened a lot sooner, whether in state court or  
16 here.

17 MR. POTTERS: So at the time that there were  
18 virtually no attorney's fees incurred by the plaintiff, where  
19 now, before Judge Mitterhoff on the return date of the order  
20 to show cause, the FBI did not intervene. We filed an  
21 answer. We filed a counterclaim -- I'm sorry. We filed --  
22 we did file a counterclaim. And we filed a third-party  
23 complaint seeking defense and indemnification from the FBI.

24 And so the questions that Your Honor had put to me  
25 and to counsel earlier in terms of, well, on what basis did

1 NJI rely on the direction provided by the FBI? Could NJIT  
2 have conducted a review? those questions are answered  
3 directly without any equivocation once the FBI filed its  
4 answer to NJIT's counterclaim. Unless there be any doubt, to  
5 the extent there was any discretion -- and if the Court finds  
6 that NJIT had any discretion up until that point, once the  
7 counterclaim is filed seeking declaratory and injunctive  
8 relief against NJIT from doing that which plaintiff would  
9 have had us do, NJIT's hands at that point in time are most  
10 certainly tied and constrained by the FBI.

11 And that's where the facts, again, matter, because  
12 that's the point in time where we had reassembled the  
13 documents, and they were on the table in my conference room,  
14 as I noted earlier. And even if we wanted to at that point  
15 in time say to the plaintiff, here's the documents, come to  
16 my conference room, take a look at it, we couldn't, because  
17 there's now a counterclaim for declaratory injunctive relief  
18 against us.

19 And even at that point in time, plaintiff never --  
20 knowing that the FBI at that -- at that point in time,  
21 plaintiff clearly knew that FBI was in control of the  
22 documents, because they're telling us, thou shall not produce  
23 the documents, lest we get an injunction against you, lest we  
24 get a declaratory relief levied against you.

25 And even then, very early on, with only nominal

1 amount of fees incurred, plaintiff didn't issue a FOIA  
2 request. What that establishes is that the FBI had complete  
3 control over the documents assembled by NJIT. Period. End  
4 of story. No semicolon. No but. No however. Period.

5 FBI was the custodian of these records at the  
6 moment in time that counterclaim was filed.

7 THE COURT: Wait a second, because, you know, we  
8 always go to the definition, under the statute, which  
9 47:1A-1.1, defines custodian as that official designated by a  
10 public agency to respond to requests as to which the agency  
11 has custody or control -- in the disjunctive. And I suppose,  
12 technically, because the information still resided on NJIT's  
13 servers, if the FBI didn't require them to delete it, they  
14 still had custody, if not control.

15 MR. POTTERS: Well, they certainly had possession.  
16 And I would submit most certainly, they did not have control.

17 THE COURT: Right. Control is what you seem to be  
18 focusing on.

19 MR. POTTERS: Correct. And --

20 THE COURT: I think there were two custodians here.

21 MR. POTTERS: There -- there arguably could be two  
22 custodians, but when the world's premier law enforcement  
23 agency is giving you direction, with all due respect, you're  
24 no longer the custodian for purposes of OPRA.

25 Almost done, Judge. Just a few more points.

1 THE COURT: Yeah, that's fine.

2 Can I ask you a miscellaneous question?

3 MR. POTTERS: Sure.

4 THE COURT: There were certain domains that  
5 Mr. Golden wanted that related to the CIA. And then I saw in  
6 one of the early letters, one of the May letters back from  
7 NJIT that the answer to the CIA request was "none."

8 MR. POTTERS: Correct.

9 THE COURT: There -- okay. So it was "none," not  
10 "the FBI's reviewing CIA information as well."

11 MR. POTTERS: There were no documents assembled --

12 THE COURT: Okay.

13 MR. POTTERS: -- in response to the OPRA request  
14 that related to that request.

15 THE COURT: From the CIA. Okay.

16 And do you agree this is an R & R to Judge Arleo?

17 MR. POTTERS: I think that's the way it is. And  
18 we're completely satisfied with that.

19 THE COURT: Okay.

20 MR. POTTERS: Now, just few of more points.

21 What plaintiff argues is that NJIT, after this  
22 counterclaim is -- after the answer to the counterclaim is  
23 filed, based on the joint status reports that are before the  
24 Court and in the brief in here, plaintiff argues, it doesn't  
25 matter. You still, NJIT, had this obligation.

1 And I just -- the argument is lost on me.

2 THE COURT: Well, that's where the two sides  
3 diverge. I'm not surprised.

4 MR. POTTERS: Yes. And -- but what they don't do  
5 is they don't cite any law to support that position. An.

6 D the law that does exist, albeit dicta in the  
7 Gannett decision -- or the Gannett decision -- supports this  
8 position, number one. Number two, under then-governor  
9 McGreevey's executive order, they recognized this issue. Why  
10 they haven't amended it to make it apply, I don't know.  
11 There's no -- what we do agree on is there is no case similar  
12 to this in the United States.

13 THE COURT: Well, thanks a lot.

14 MR. POTTERS: In terms of --

15 (Laughter)

16 MR. POTTERS: -- in terms of state statutes that  
17 mandate disclosure. It's surprising that under OPRA and  
18 right of access statutes throughout the country, that this  
19 issue has not yet arisen, but it arises here.

20 Now, last two points, now we're at the suit  
21 production stage. Okay? We had the request. We had the  
22 denial. Now we have the lawsuit and the production.

23 Who did the rereview of the documents? Not NJIT.  
24 And Your Honor made this point earlier, so I don't think I  
25 need to go through it point by point. The fact is NJIT had

1 no substantive involvement in lifting any of the redactions  
2 and ultimately releasing any of the documents for production.  
3 NJIT was simply a courier.

4 THE COURT: I think that's shown by the letters,  
5 which enclose the disks and the underlying correspondence  
6 from the FBI wherein NJIT says, here's this information the  
7 FBI is letting us send you.

8 MR. POTTERS: Now, despite those facts, that NJIT  
9 was not involved in that rereview, the argument that's  
10 presented on this fee application in both plaintiffs' moving  
11 brief and in their reply to our opposition is just to restate  
12 the simple OPRA calculus: request, denial, suit, production,  
13 fees.

14 And the facts here clearly demonstrate that this is  
15 anything but simple. It's not a garden-variety OPRA case --

16 THE COURT: Look at, it comes down to one thing,  
17 doesn't it? Factual causal nexus.

18 MR. POTTERS: That's exactly right. And here, I  
19 think --

20 THE COURT: I don't think you're arguing that they  
21 didn't have a substantive underlying right, that they -- to  
22 the records. I don't see that in any of the briefs. I think  
23 it's on the nexus. Right?

24 MR. POTTERS: I think the way I characterize it is  
25 that the actions, whether you do not -- whether you choose to

1 reject my argument that the FBI is a *de facto* records  
2 custodian --

3 THE COURT: Right. Putting that aside --

4 MR. POTTERS: -- I think there's a number of --

5 THE COURT: -- but I -- I'm not -- I'm not that  
6 enamored of that at this point.

7 MR. POTTERS: But there's another way to present  
8 that, that the actions of the FBI constitute a superseding  
9 intervening -- that relieves NJIT or discharges it of what  
10 would otherwise be its duty under OPRA.

11 And I think that is not being clever --

12 THE COURT: I'm not sure we can import that body of  
13 law into OPRA, but I appreciate your argument.

14 MR. POTTERS: So let me return to the question that  
15 I put at the outset: Why are fees awarded under the OPRA  
16 statute?

17 And one thing any good lawyer does and any good  
18 client does that's involved substantively in the processes,  
19 they look back at what occurred, and they say what could we  
20 do differently, if this issue arose in the future?

21 I guess one thing NJIT could do is it could say to  
22 the FBI, these documents have a moniker on them, you can take  
23 a look at them. But here's a defense and indemnity agreement  
24 I want you to sign before you look at them. Now, that's not  
25 going to work, obviously.



1 THE COURT: Well, I think Ms. Townsend would say,  
2 do what Florida state did.

3 MR. POTTERS: I don't think you can do what Florida  
4 state did. And I don't think the Florida state is remotely  
5 analogous to what occurred here.

6 THE COURT: I couldn't get a good handle on it. I  
7 read the letter from Florida state. There's a lot of  
8 discussion about a particular gentleman and -- so it's  
9 difficult. And I hear that -- NJIT's argument that it's a  
10 different state law and so forth.

11 MR. POTTERS: And I also think it's hearsay,  
12 because it's not properly before the Court. But let's put  
13 that to the side.

14 At the end of the day, if this case arose tomorrow,  
15 NJIT would do absolutely nothing different. It would do  
16 exactly what it did here: Pick up the phone, deal with the  
17 contact at the FBI that they deal with on an almost daily  
18 basis on a multitude of security issues. And it would say,  
19 we have a request here. We've assembled the documents.  
20 There's FBI monikers on these documents. What do you want us  
21 to do?

22 I think that goes to show the reasonableness of  
23 what NJIT did, the lack of any lack of transparency with what  
24 NJIT did, and the fact that all of this was disclosed to  
25 plaintiff. Nothing was hidden from plaintiff. It's not as

1 if NJIT said, we're -- we're giving you these documents.

2 There's redactions. Lots of documents are withheld. Don't  
3 talk to us.

4 They were very transparent with what they did. And  
5 I don't think they could have done anything differently.  
6 There's no knowing or willful violation in any way, shape, or  
7 form that justifies any award of attorney's fees here against  
8 NJIT.

9 Thank you, Judge.

10 THE COURT: Thank you.

11 Ms. Townsend?

12 MS. TOWNSEND: Thank you, Your Honor. I'll try to  
13 keep it brief.

14 I did want to address a couple of things that  
15 counsel for NJIT raised in his argument. I would just as a  
16 factual matter sort of take issue with the idea that  
17 plaintiffs -- well, first I'll start by saying, I don't think  
18 we're -- we're not critical of the Court in terms of the time  
19 it spent to resolve this. In fact, I think -- I meant what I  
20 said when -- I think it's beneficial when parties can get  
21 together and talk about withholdings and try to narrow -- at  
22 a minimum, narrow the scope of issues that they're going to  
23 present to the Court. I think that was effectively done  
24 here.

25 I think in terms of it -- did we anticipate the

1 sort of ins and outs of all of this? And did my client  
2 anticipate the ins and outs in all of this when he made an  
3 OPRA request to NJIT? He frankly did not. And I think I was  
4 responding to your question concerning -- which was a  
5 question that Judge Mitterhoff also asked: Why didn't you  
6 submit a FOIA request? I think that's a fair question. And  
7 I think I've responded to what I think our expectation was  
8 that, generally speaking, public records -- or my clients'  
9 expectation was that, generally speaking, public records  
10 requests, the state entities under state law are resolved  
11 more quickly.

12 Maybe that's not the case here. We're not  
13 complaining about that. But I think that that sort of  
14 explanation --

15 THE COURT: Right.

16 MS. TOWNSEND: -- of what we were thinking at the  
17 time.

18 THE COURT: Right. But it's not an election. It's  
19 not either/or. You can do both.

20 MS. TOWNSEND: And it's both in many cases and, in  
21 fact, most cases. And there were -- it wasn't just -- I  
22 can't recall if it was Florida state, it might have been the  
23 University of South Florida that we attached the letter  
24 from --

25 THE COURT: Yeah, I may have misspoken that.

1 MS. TOWNSEND: I think that's right. But  
2 Mr. Golden, in his declaration that he submitted in  
3 connection with his motion, the motion for attorney's fees,  
4 indicated that, in fact, he made a -- his book is lengthy.  
5 He made a number of similar requests. So it wasn't just that  
6 university. It was the University of Illinois, University of  
7 Florida, University of California-Davis, I believe. So  
8 there's a number that he lists -- Arizona, I also believe,  
9 responded to this similar requests for the same essentially  
10 communications.

11 I would note that -- I do take issue with the idea  
12 that plaintiffs sort of extend the briefing schedule by  
13 attempting to keep this case in this court. I think our  
14 concern -- and I thought it was clear, based on the  
15 discussions that we had before Your Honor, that our concern  
16 was just getting this resolved as quickly as possible. In  
17 fact, we wanted to minimize briefing, and we wanted to  
18 minimize sort of back and forth.

19 So we were -- and we also wanted to minimize the  
20 possibility that we would end up in a sort of -- a situation  
21 like what occurred in Courier News, which I think ultimately  
22 came out well, but it as well resulted in sort of a remand  
23 and then additional briefing on which parties were  
24 responsible. We were obviously, concerned, as plaintiffs,  
25 that if the FBI was permitted to be dismissed from the case

1 and the matter was remanded, that it could actually lengthen  
2 the litigation.

3 So I -- I take issue a little bit with the idea  
4 that we were sort of forum shopping. We didn't choose -- I  
5 commend this court and Your Honor --

6 THE COURT: To be --

7 MS. TOWNSEND: -- for the way this case has been  
8 handled. But I -- we didn't choose to be here. It was a  
9 function of the FBI removing. So I would just take a little  
10 bit of issue with that characterization.

11 I think with respect to the Gannett case -- and  
12 I'll also note that NJIT's counsel, sort of, through out his  
13 argument indicated that plaintiffs knew that NJIT didn't  
14 control the records or knew it didn't -- I think we all -- we  
15 actually are kind of operating, using the same set of facts.  
16 But it's our position, our legal position, that, in fact,  
17 NJIT did have a lot more control and, in fact, did control  
18 its own records in a way that there's simply not admitting  
19 to.

20 So I don't think it's a question of facts. I  
21 actually think it's a legal --

22 THE COURT: How so?

23 MS. TOWNSEND: -- question.

24 Mr. Potter's indicated that plaintiff's cite no  
25 authority for the proposition that these are, in fact -- that

1 it had any obligation whatsoever to do anything with respect  
2 to these records in response to plaintiffs' OPRA requests.

3 But there's really been no dispute that NJIT and  
4 Clara Williams were the custodian of these records, as  
5 defined by statute, they're the public agency. It's defined  
6 again, by statute. These are government records; again,  
7 defined by statute. The onus is on the New Jersey government  
8 entity to comply with OPRA. It's a statutory obligation.

9 THE COURT: So you don't believe the moniker on the  
10 documents and the FBI's direction were legally binding on  
11 NJIT?

12 MS. TOWNSEND: I don't think they're -- they  
13 constitute a legal basis for NJIT to then deny the OPRA  
14 requests.

15 Now, again, it's a starting point. We don't -- we  
16 don't contend, and I think -- I wanted to draw the Court's  
17 attention to Gannett, because I do think it's helpful in the  
18 sense that's very far from what occurred here. I mean, the  
19 Court there was concerned that you were dealing with  
20 investigatory records that were actually grand jury  
21 subpoenas, that were subject to a very specific exemption  
22 under OPRA. And the court made it clear that the United  
23 States Attorney's Office, because they were never informed of  
24 the requests, they weren't given notice of the litigation,  
25 was deprived of the opportunity to assert the confidentiality

1 of the grand jury subpoenas, under OPRA. In other words,  
2 what the court in Gannett is saying is that the agency might  
3 not know enough to be able to assert the appropriate OPRA  
4 exemptions.

5           You should give notice to the federal agency or the  
6 third party. I mean, I think Mr. Potter is just saying this  
7 is such a -- you know, an unusual case. But, in fact, it's  
8 not terribly uncommon for there to be a third-party  
9 litigation concerning public records cases. We often see it  
10 in the context of, you know, a request made to a law  
11 enforcement entity, and then for records concerning a police  
12 officer, maybe the police union intervenes as a third party.

13           I will say I, again, disagree with Mr. Potter's  
14 position that by doing so, by participating -- that third  
15 party participating in the case, suddenly removes all of the  
16 OPRA or other public records obligations from the actual  
17 agency.

18           THE COURT: Right.

19           MS. TOWNSEND: What it does is give the third party  
20 the opportunity to make their arguments.

21           THE COURT: I understand.

22           MS. TOWNSEND: And I think that's -- that's what  
23 happened here.

24           So I think they had every right to consult with the  
25 FBI --

1 THE COURT: Okay. Try to wrap it up. I'm denying  
2 my staff a lunch, because we start our afternoon calendar at  
3 2:00.

4 MS. TOWNSEND: I --

5 THE COURT: Sorry. We've gone longer than I  
6 anticipated, although it's been very helpful.

7 MS. TOWNSEND: The last two -- just the last point  
8 that I would make, then, is that -- I would direct the Court  
9 to -- to the Courier News case, which I think is very  
10 helpful. In that case, it was a fees issue. And again, it  
11 was -- the only issue before the court was fees. The  
12 Appellate Division held it was the custodian of the  
13 government record that was responsible for fees, even if, as  
14 the trial court held, it felt that it was responding to what  
15 the state wanted it to do; in other words, it was doing a  
16 state law enforcement function when it denied the request.  
17 The county was still responsible, because it was ultimately  
18 the custodian of records. That's its statutory obligation.

19 And the other case that I would -- that I might  
20 also, again, point the Court to -- again, it's an unpublished  
21 decision, but the Path case that we cite, which points to a  
22 protective order and doesn't allow -- and, again, I think,  
23 frankly, a protective order, even if it's a stipulated  
24 discovery protective order, at least has a legal foundation,  
25 where you can understand why a party might not want to



1 violate it, but even in that case, agency -- or the court  
2 concluded, the Appellate Division concluded that the agency  
3 couldn't rely on that to deny a request --

4 THE COURT: I think was trying to bootstrap,  
5 because it was -- those were its own records. And then it  
6 was -- I've seen in cases too, where they were saying, oh,  
7 it's subject to confidentiality order, but they were the  
8 owner of the records. It didn't make any sense in that  
9 context, frankly.

10 MS. TOWNSEND: Right. I understand.

11 And then one last note, Your Honor. I would say  
12 that Mr. Potter's ended his argument by indicating that NJIT  
13 wasn't acting willfully. It wasn't acting in bad faith. He  
14 sort of -- that's -- unfortunately, when you have a mandatory  
15 fee provision, that's not an argument that has any legal  
16 merit. It doesn't have anything to do with whether or not  
17 there's a factual causal nexus between the litigation that my  
18 client filed in order to get public records in order to  
19 report on a matter of public concern, which NJIT has  
20 conceded. It -- all it means -- and I understand why he  
21 makes that point. But unfortunately, that's not an exception  
22 to OPRA's --

23 THE COURT: Right.

24 MS. TOWNSEND: -- mandatory fee --

25 THE COURT: But, I mean, I understand it too,

1 because the cases do talk about reasonableness, and I think  
2 it sort of goes to that.

3 Thank you very much --

4 MS. TOWNSEND: Thank you, Your Honor.

5 THE COURT: -- everyone. This was very helpfully  
6 argued.

7 MR. POTTERS: Thank you, Judge. Thank you, staff,  
8 for staying through lunch.

9 THE COURT OFFICER: Sorry.

10 THE COURT: Yes. I want to thank you. No, no, it  
11 was -- I drag them along for the ride. I -- it was very  
12 helpful to me. Thank you.

13 THE COURT OFFICER: All rise.

14 (Conclusion of proceedings at 1:34 P.M.)  
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## Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 67 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

20th of March, 2018

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Signature of Approved Transcriber

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Date

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